AGS HARTA SDN BHD A

v.

LIEW YOK YIN

COURT OF APPEAL, PUTRAJAYA B
RAUS SHARIF JCA
SULONG MATJERAIE JCA
MOHD HISHAMUDIN YUNUS JCA
[CIVIL APPEAL NO: J-02-475-2006]
1 OCTOBER 2009 C

LAND LAW: *Indefeasibility of title and interests - Forged transfer - Whether sufficient evidence to support trial judge's finding of forgery - Whether handwriting expert required to authenticate signatures on sale documents - Whether bona fides of purchaser proved - National Land Code, s. 340(2)(b), 340(3)* D

The respondent as plaintiff brought a claim against the appellant as defendant in the trial court to have her land restored to her as the registered proprietor after a forged transfer to the appellant without her knowledge. It was not disputed that the respondent bore the same name as the person who purportedly sold the subject land but with a different identity card number and address. The identity card and the address as stated in the sale documents were not of the respondent's. The appellant denied the existence of the forgery and claimed that it was a *bona fide* purchaser for value having paid the full purchase price of RM500,000 and the necessary stamp duties and registration fees. The trial judge found in favour of the respondent on the grounds that: (1) forgery was proved and therefore the defeasibility provision of s. 340(2)(b) National Land Code ('NLC') applicable; and (2) the appellant was not a *bona fide* purchaser for value so as to avail itself of protection of the proviso to s. 340(3) NLC (see *Liew Yok Yin v. AGS Harta Sdn Bhd* [2006] 3 CLJ 787). The appellant now appealed on the grounds that there was insufficient evidence for the trial judge to conclude forgery and that the appellant was not a *bona fide* purchaser for value. E F G H

Held (dismissing the appeal)
Per Raus Sharif JCA delivering the judgment of the court:

(1) The decision of the Federal Court in *Adorna Properties v. Boonsom Boonyanit** undoubtedly placed registered owners of landed properties in jeopardy. The effect of that decision was I

A that landowners might, one morning, find themselves no longer owning their landed properties without any fault or knowledge on their part. Despite the criticisms, the Federal Court decision, being the decision of the apex court remained a binding authority. (para 13)

B

(2) The trial judge found as a fact that the respondent did not execute the sale documents. That aspect of his finding was not only based on the evidence of the respondent but also on the evidence of the appellant's witness. A handwriting expert need C not be called to verify the authenticity of the plaintiff's signatures on those documents. There was more than sufficient evidence to support the trial judge's findings that the respondent had never executed the documents for the disposal of the subject land. Common sense dictated that someone else must D have forged the respondent's signature on the documents. That fact was confirmed by the appellant's own witness who testified that it was not the respondent who executed the documents. (paras 15, 16 & 17)

E **(3)** The trial judge found on the balance of probabilities that the appellant failed to discharge the burden that it was a *bona fide* purchaser for value. He clearly assessed the evidence of the appellant's witnesses and gave reasons for his finding. There was no fault or error in the reasons given by him. (paras 18 & 19)

F *[Costs at RM10,000 to be paid by appellant to respondent. Deposit for appeal ordered to be paid to respondent towards account of fixed costs.]*

Bahasa Malaysia *Translation Of Headnotes*

G Di mahkamah bicara, responden selaku plaintif telah memulakan tindakan terhadap perayu selaku defendan supaya tanahnya yang dipindahmilik kepada perayu secara penipuan dan tanpa pengetahuannya dikembalikan dan didaftar semula atas namanya. Tidak dinafikan bahawa nama responden adalah sama dengan nama H orang yang dikatakan menjual tanah tersebut, walaupun kedua-duanya mempunyai nombor kad pengenalan dan alamat yang berbeza. Kad pengenalan dan alamat seperti yang tercatat pada dokumen penjualan adalah bukan milik responden. Perayu menafikan wujudnya pemalsuan dan mendakwa bahawa ia adalah I pembeli *bona fide* untuk nilai setelah membayar sepenuhnya harga

belian berjumlah RM500,000 serta duti setem dan yuran pendaftarannya. Hakim bicara memutuskan untuk responden atas alasan bahawa: (1) pemalsuan telah dibuktikan dan kerana itu peruntukan kesangkalan hakmilik di bawah s. 340(2)(b) Kanun Tanah Negara ('KTN') terpakai; dan (2) perayu bukan seorang pembeli *bona fide* untuk nilai bagi membolehkannya mendapat perlindungan proviso kepada s. 340(3) KTN (lihat *Liew Yok Yin v. AGS Harta Sdn Bhd* [2006] 3 CLJ 787). Perayu kini merayu atas alasan bahawa tidak terdapat keterangan yang mencukupi untuk hakim bicara merumuskan wujudnya pemalsuan atau bahawa perayu bukan seorang pembeli *bona fide* untuk nilai.

Diputuskan (menolak rayuan)
Oleh Raus Sharif HMR menyampaikan penghakiman mahkamah:

(1) Keputusan Mahkamah Persekutuan dalam *Adorna Properties v. Boonsom Boonyanit** tidak syak lagi meletakkan pemilik berdaftar hartanah di dalam bahaya. Kesan keputusan tersebut adalah bahawa pemilik-pemilik tanah mungkin pada suatu pagi mendapati diri mereka tidak lagi memiliki hartanah mereka tanpa pengetahuan atau apa-apa kesilapan mereka. Walaupun dengan kritikan sedemikian, keputusan Mahkamah Persekutuan tersebut, selaku keputusan mahkamah tertinggi, adalah autoriti yang mengikat.

(2) Hakim bicara mendapati sebagai satu fakta bahawa responden tidak memeterai dokumen penjualan. Aspek dapatan beliau itu tidak hanya diasaskan kepada keterangan responden sahaja tetapi juga atas keterangan saksi perayu. Seorang pakar tandatangan tidak perlu dipanggil untuk mengesahkan kesahihan tandatangan plaintif pada dokumen-dokumen tersebut. Terdapat keterangan yang lebih dari mencukupi untuk menyokong dapatan hakim bicara bahawa responden tidak pernah memeterai dokumen-dokumen bagi melupuskan tanah berkenaan. Akal budi menetapkan bahawa seorang orang lain tentu telah memalsukan tandatangan responden pada dokumen-dokumen. Fakta ini telah disahkan oleh saksi perayu sendiri yang menyatakan bahawa responden bukanlah orangnya yang memeterai dokumen-dokumen.

(3) Hakim bicara mendapati atas imbangan kebarangkalian bahawa perayu telah gagal memenuhi beban bahawa ia adalah seorang pembeli *bona fide* dengan nilai. Beliau telah menaksirkan

keterangan saksi-saksi perayu dengan jelas dan telah memberikan alasan-alasan bagi dapatannya. Tiada kekurangan atau kesilapan pada alasan-alasan yang diberikan beliau.

[Kos pada kadar RM10,000 hendaklah dibayar oleh perayu kepada responden. Deposit rayuan diperintah dibayar balik kepada responden kearah akaun kos ditetapkan.]

Case(s) referred to:

Adorna Properties Sdn Bhd v. Boonsom Boonyanit [2001] 2 CLJ 133 FC ***(refd)***

Au Meng Nam v. Ung Yak Chew [2007] 4 CLJ 526 CA ***(refd)***

Subramaniam NS Dhurai v. Sandrakasan Retnasamy & Ors [2005] 3 CLJ 539 CA ***(refd)***

Legislation referred to:

National Land Code, s. 340(2)(b), (3)

Other source(s) referred to:

Assoc Professor Teo Keang Soo, *Demise of Deferred Indefeasibility Under the Malaysian Torrens System,* Faculty of Law, National University of Singapore [2002] Singapore Journal of Legal Studies, pp 403-408

For the appellant - Dato' Harpal Singh (AK Sharma with him); M/s AK Sharma

For the respondent - Bernard George; M/s Tay, Bernard & Cheong

[Appeal from High Court, Johor Bahru; Suit No: 22-436-2002 (1)]

[Editor's note: the Federal Court case of Tan Ying Hong v. Tan Sian San & Ors [2010] 2 CLJ 269 had since overruled the decision of Adorna Properties v. Boonsom Boonyanit [2001] 2 CLJ 133.]

Reported by Usha Thiagarajah

JUDGMENT

Raus Sharif JCA:

[1] This is an appeal by the defendant against the decision of the learned High Court Judge at Johor Bahru in allowing the plaintiff's claims against the defendant in respect of Johor Bahru, High Court Suit No. 22-436-2002 (1).

[2] We heard the appeal on 28 July 2009 and unanimously dismissed it with costs. We now give our reasons.

[3] The brief facts leading to this appeal are these. On 26 January 1999, the defendant executed a sale and purchase agreement with a lady named Liew Yok Yin of No. 128, Jalan Padi Mahsuri, Taman Senai Baru, 81400 Senai ("vendor") for the purchase of an agricultural land measuring 7A 3R 27P held under GM 210 Lot 1184 Mukim Senai-Kulai, Daerah Johor Bahru ("said land") at a purchase price of RM500,000. The vendor was represented by Messrs Loh & Renga, Johor Bahru in the sale of the said land.

[4] The said land was registered in the defendant's name on 25 January 2000 by the Pentadbir Tanah Daerah Johor Bahru. Form 14A dated 2 November 1999 was used to effect the transfer.

[5] The plaintiff's name is also Liew Yok Yin, similar to the name of the vendor. However, her identity card number and address differ from that of the vendor's. The identity card number and the address as stated in the sale and purchase agreement and Form 14A are not of the plaintiff's.

[6] On 3 August 2001, the plaintiff was informed by her son, Chia Chee Chiong, of clearance works on the said land. The plaintiff lodged a police report upon being shown by the defendant a copy of the title of the said land duly registered under the defendant's name.

[7] Thereafter, the plaintiff instituted this present suit seeking for various declaratory relief. Basically, the plaintiff was seeking to have the said land restored to her as the registered proprietor.

[8] The basis of plaintiff's claim was that she did not at any time execute any instrument of transfer in the defendant's favour and that the original issue document of title has all along been in her possession and she had never parted with it. She contended that the registration of the title into the defendant's name was wrong, illegal and void as the registration has been obtained by forgery.

[9] The defendant in their defence denied the existence of forgery on the instrument of transfer and pleaded that even if forgery exists they were *bona fide* purchaser for value having paid the full purchase price of RM500,000 and the relevant stamp duties and registration fees. By reason thereof, they have acquired an indefeasible title under s. 340 of the National Land Code 1965.

[10] Section 340 of the National Land Code provides as follows:

(1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.

(2) The title or interest of any such person or body shall not be indefeasible –

(a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or

(b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or

(c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

(3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in subsection (2) –

(a) it shall be liable to set aside in the hands of any person or body to whom it may subsequently be transferred; and

(b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:

Provided that nothing in this subsection shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such purchaser.

(4) Nothing in this section shall prejudice or prevent –

(a) the exercise in respect of any land or interest of any power of forfeiture or sale conferred by this Act or any written law for the time being in force, or any power of avoidance by any such law; or

(b) the determination of any title by operation of law.

[11] The Federal Court in *Adorna Properties Sdn Bhd v. Boonsom Boonyanit* [2001] 2 CLJ 133 set out the workings of s. 340 of the National Land Code. What had happened in that case was this. A rogue had forged Ms Boonsom Boonyanit's signature and sold and transferred two pieces of land belonging to her to Adorna Properties who then became the registered proprietor. Ms. Boonsom Boonyanit brought an action against Adorna Properties to have the lands registered back to her as the registered proprietor. She failed in the High Court but succeeded in the Court of Appeal. Adorna Properties appealed to the Federal Court. The Federal Court reversed the Court of Appeal decision and upheld the High Court decision.

[12] In effect, the Federal Court in construing s. 340 held that even if the instrument of transfer was forged, a purchaser in good faith and for valuable consideration nevertheless obtained an indefeasible title to the land. The court said in the following words:

> The proviso to subsection (3) of s. 340 of the NLC deals with only one class or category of registered proprietors for the time being. It exclude from the main provision of subsection (3) this category of registered proprietors are not caught by the main provisions of this subsection. Who are these proprietors? The proviso says that any purchaser in good faith and for valuable consideration or any person or body claiming through or under him are excluded from the application of the substantive provision of subsection (3). For these category of registered proprietors, they obtained immediately indefeasibility notwithstanding that they acquired their titles under forged documents.

[13] The decision of the Federal Court has no doubt placed registered owners of landed properties in jeopardy. The effect of that decision is that land owners may, one morning, find themselves no longer owning their landed properties without any fault or knowledge on their part. Thus, it is not surprising that the decision had been heavily criticised. To some, the Federal Court's decision was plainly wrong and should be disregarded. (See *Subramaniam NS Dhurai v. Sandrakasan Retnasamy & Ors* [2005] 3 CLJ 539, *Au Meng Nam v. Ung Yak Chew* [2007] 4 CLJ 526 and an article *"Demise of Deferred Indefeasibility Under the Malaysian Torrens System"* by Associate Professor Teo Keang Soo, Faculty of Law, National University of Singapore [2002] Singapore Journal of Legal Studies 403-408).

[14] Despite the criticisms, the Federal Court decision, being the decision of the apex court, remains a binding authority. We believe the learned trial judge had the Federal Court decision in mind when he decided the present case. The learned trial judge after considering the evidence adduced by the respective witnesses of the plaintiff and the defendant held that:

(i) the sale documentation was a forgery and hence the defeasibility provision of s. 340(2)(b) National Land Code applies;

(ii) the defendant are not *bona fide* purchaser for value so as to avail themselves of protection of the proviso to s. 340(3).

[15] The contentions of the defendant before us are these. First, there was insufficient evidence for the learned trial judge to conclude that the signatures on the sale and purchase agreement, Form 14A and valuation forms were not of the plaintiff but were in fact forgeries. Second, the learned trial judge was wrong in finding that the defendant was not a *bona fide* purchaser for value of the said land.

Forgery

[16] The learned trial judge found that on the cumulative effect of the evidence adduced in this case the sale documentations comprising of the sale and purchase agreement, the transfer forms and the valuation forms did not bear the signature of the plaintiff. Hence, the signature appearing thereon not being the signature of the plaintiff cannot be a sufficient instrument to convey title to the defendant. He found it as a fact that the plaintiff did not execute the sale and purchase agreement, the transfer form and the valuation form. This aspect of his finding was not only based on the evidence of the plaintiff herself which the learned judge accepted as a witness of truth, but also on the evidence of the defendant's witness, Mr. Loh Song Chuan (SD2) who had testified that the person by the name of Liew Yok Yin from whom he prepared the sale documentations and who executed the same was not the plaintiff.

[17] We are in agreement with the learned judge's finding. We are unable to accept the defendant's submission that a handwriting expert must be called in order to verify the authenticity of the plaintiff's signatures on those documents. We are of the view that

there is no necessity to call the handwriting expert. This is because there are more than sufficient evidence to support the learned trial judge's findings that the plaintiff had never at any time executed the sale and purchase agreement, the transfer form and the valuation forms for the disposal of the said land. If she had not done so, someone else must have done it. Common sense tells us that someone else must have forged her signatures on those documents. This fact was even confirmed by the defendant's own witness ie, SD2, who testified that it was not the plaintiff who executed the sale documentations of the said land. Hence, the defendant's submission on this issue is devoid of any merit.

Bona Fide Purchaser

[18] The learned trial judge found that on the balance of probabilities the defendant had failed to discharge the burden that they were a purchaser in good faith for value. He gave his reasons as follows:

> Evidence adduced establishes that the circumstances in concluding the sale without any proper investigation into the title or the person claiming to be owners of the property and the unexplained completion effected five months after the completion date in contravention of the express terms of time being the essence clearly negatives the *bona fides* of the defendant.
>
> The evidence of SD1 clearly establishes that he never met the vendor personally as all dealings was done through the clerk to Messrs Abdul Haris and the solicitor therein who represented him. There is no supportive evidence adduced that there was investigation into the title to the said property and there does not appear to be any valuation done.
>
> In this connection it is also pertinent to allude to the evidence of SD2 Loh Song Chuan the solicitors for the vendor. Upon scrutinizing his evidence, regretfully I have to say that it does not inspire confidence. In his own evidence he is a seasoned lawyer of 20 years practice but the manner in which he involved himself in the transaction leaves much to be desired – this is particularly telling in the manner in which he did not prepare the CKHT forms nor retained any gains tax amount when the Agreement he prepared specifically provided for the provision of retaining property gains tax and more so when a scrutiny of the title presented by the vendor would reveal that she acquired the title in 1997 which is about 2 years back from the sale and hence would invariably attract real property gains.

A Again his attempt to adduce evidence that the defendant was not involved in fraud is questionable when he was never at any time representing the defendant.

The conduct aforesaid leads me to conclude that the evidence of SD2 cannot be supportive of the *bona fide* of the defendant.

B

Now aside from the evidence of SD1 that the defendant is a *bona fide* purchaser for value there is no other supporting evidence as regards his *bona fides*. There is no evidence from defendant and/or defendant's lawyer who represented the defendant that he ensured that an amount to cover the real property gains tax payable was retained by the vendor's solicitors bearing in mind that the vendor's solicitors was contractually obligated to retain such part of the balance of the purchase price for such purpose.

C

In the absence of any supporting evidence I cannot conclude that the defendant is a *bona fide* purchaser even though valuable consideration had been given.

D

[19] From the above, the learned trial judge had clearly assessed the evidence of the defendant's witnesses but concluded that the defendant was not a *bona fide* purchaser for value to avail themselves of the proviso to s. 340(3) of the National Land Code. The finding of the learned trial judge that the defendant was not a *bona fide* purchaser was a finding of fact. It is most unusual for an appellate court to reverse a trial judge's findings on facts, unless good reasons are shown to us. We see none. In fact, the learned trial judge had given his reasons as to why the defendant was not a *bona fide* purchaser for value and we could not find any fault or error in the reasons given by him. Thus, we affirmed the learned trial judge's finding that the defendant was not a *bona fide* purchaser for value.

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G **[20]** In conclusion, we are satisfied that the learned trial judge had properly appreciated the evidence adduced in this case. Accordingly, we dismissed the appeal. After hearing the parties on costs we fixed costs at RM10,000 to be paid by the defendant to the plaintiff. The deposit for the appeal was ordered to be paid to the plaintiff towards account of fixed costs.

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